PUBLIC PROSECUTOR

v.

DATO' KEE YONG WEE, KOH KIM SWEE & OTHER CASES

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[FT CRIMINAL APPLICATION NO. 14, NO. 14A & NO. 15 OF 1987]
9 JULY 1987

CRIMINAL LAW AND PROCEDURE: *Transfer of case from Sessions Court to High Court - Charge of criminal breach of trust - Public Prosecutor applies to have case tried in High Court - Grounds for transfer - Length of period of trial and unlikely of continuous hearing at one stretch in Sessions Court - Questions of law of unusual complexity likely to arise during trial.*

BANKING: *Banker's book - Account holders - Withholding consent to production of bank statement at trial - Sessions Court - Whether has power to compel bank officers "to produce statements and accounts" - Bank Negara - Disclosure of account - Whether has power to authorise disclosure - If Bank Negara refuses to authorise disclosure - Whether High Court or a Judge can order disclosure - Bankers' Books (Evidence) Act 1949.*

This was an application by the Public Prosecutor for orders under s. 417(2) of the Criminal Procedure Code (CPC) that the trial of 3 cases scheduled in the Sessions Court, Kuala Lumpur, be transferred to the High Court, Kuala Lumpur, under s. 417(1)(cc)of the CPC. The grounds of the applications *inter alia* are (i) the trial would take considerable length of time and it is unlikely that the parties will get a continuous hearing at one stretch in the Sessions Court; (ii) it is likely that there would arise some questions of law of unusual complexity during the course of trial but this ground was not pursued vigorously.

Held:

[1] "For all purposes and intents" s. 417(1)(b) of the CPC "has fallen into desuetude and obsolecence for transfer of cases to the High Court" since the Sessions Court Judges are legally qualified and possess considerable experience and professional competence. If indeed, there are any questions of law of unusual difficulty then the prosecution and the defence are enjoined to do what they normally do in any case in any Court to clearly define and argue the issues fully and exhaustively before the Court.

[2] In the context of s. 36(2)(a) of the Banking Act 1973 and the applications in this case, if an account holder refuses to give permission to an officer of a bank to give, divulge or reveal any information whatsoever regarding the moneys or relevant particulars of his account, there can be no disclosure, in the absence of any of the pre-requisites of s. 36(2)(a), (b) and (c) of the Banking Act unless the central bank (Bank Negara)gives its consent.

[3] However, if Bank Negara refuses to give its consent then, in view of the proviso to s. 36(1) of the Banking Act, this refusal cannot limit the powers conferred on the High Court or a Judge thereof by the Bankers' Books (Evidence) Act 1949.

[4] Section 6 of the Bankers' Books (Evidence) Act only allows a High Court Judge to compel for special cause, officers of the Bank concerned to which the bank is not a party "to produce account holders' statements or accounts" in any legal proceedings if account holders withhold their consent and not a Session Court Judge.

[Applications dismissed.]

Cases referred to:
PP v. Dato Yap Peng [1987] CLJ (Rep) 284
Lin Tah Hwa v. PP [1987] CLJ (Rep) 1104
Goh Hooi Yai v. Lim Teong Ghee & Ors. [1977] 2 MLJ 26
Emmot v. The Star Newspaper Company [1892] 62 LJQB 77

Legislation referred to:
Bankers' Books (Evidence) Act 1949, ss. 3, 4, 5, 6, 7, 7(1), 8
Banking Act 1973, ss. 36, 36(1), 36(2), 36(2)(a)
Criminal Procedure Code, ss. 417, 417(2), 417(1)(cc), 417(1)(b), (c)
Criminal Procedure Code [Sing], s. 184(1)(b)
Bankers' Books (Evidence) Act 1879 [UK], ss. 3, 4, 5, 6, 7
Penal Code, ss. 109, 405, 406, 407, 408, 409

For the public prosecutor - Gooi Soon Seng (Tan Hock Chuan with him), DPPs
For the respondent Kee - Sri Ram (S.S. Mah with him)
For the respondent Wang - Manjeet Singh Dhillon
For the respondent Yeoh - Christopher Fernando (Rajasegara with him)
For the respondent Koh - Low Hop Bing

JUDGMENT

KC Vohrah J:

The Public Prosecutor has made three applications for orders under s. 417(2) of the Criminal Procedure Code that the trial of 3 cases be transferred from the Sessions Court, Kuala Lumpur, to the High Court under s. 417(cc) of the Code.

That an application under s. 417 is open and available to the Public Prosecutor under s. 417 is of course clear (per E. Abdoolcader SCJ in *PP v. Dato Yap Peng* [1987] CLJ (Rep) 284 at p. 368).

In respect of the three respondents in Criminal Application No. 14 of 1987 they are charged in the Sessions Court as follows:

> That you jointly between 5 June 1986 and 16 June 1986 at the Federal Territory of Kuala Lumpur, being agent of the Young Malaysians' Economic Development Co-operative Society Limited, to wit, directors, and in such capacities entrusted with dominion over certain property, to wit, RM1,400,000 committed breach of trust in respect of the said property and that you have thereby committed an offence punishable under s. 409 of the Penal Code.

The charge against the respondents in the Sessions Court in Criminal Application No. 14A of 1987 is as follows:

> That you between 7 May 1986 and 9 May 1986 at the Federal Territory of Kuala Lumpur, being agents of the Young Malaysians' Economic Development Cooperative society Limited, to wit, directors, and in such capacities entrusted with dominion over certain property, to wit, RM1,900,000 committed criminal breach of trust in respect of the said property and that you have thereby committed and offence punishable under s. 409 of the Penal Code.

And in respect of this charge the respondent in Criminal Application No. 15 is charged with abetment thus:

> That you between 7 May 1986 and 9 May 1986 at the Federal Territory of Kuala Lumpur, abetted the commission of the offence of criminal breach of trust of certain property, to wit, RM1,900,000 belonging to the Young Malaysians' Economic Development Co-operative Society

Limited, by Dato' Kee Yong Wee, Wong Choon Wing and Yeoh Yuen Chong which offence was committed in consequence of your abetment and that you have threreby committed and offence punishable under ss. 109 and 409 of the Penal Code.

The three applications of the Public Prosecutor for the removal of the cases from the Sessions Court to the High Court are predicated on grounds under para. (b) and (e) of s. 417(1) of the Code and they read as follows:

417. (1) Whenever it is made to appear to the High Court:

(a) ...

(b) that some question of law of unusual difficulty is likely to arise; or

(c) ...

(d) ...

(e) that such an order is expedient for the ends of justice ...

it may order

(aa)...

(bb) ...

(cc) that any particular case be transferred to and tried before the High Court; or ...

...

(ee)...

The main ground relied upon by the Deputy Public Prosecutor, Mr. Gooi, for the transfer is that specified in para. (e) of s. 417(1) - that such "an order is expedient for the ends of justice" - and it hinges on an argument related to s. 6 of the Bankers' Books (Evidence) Act 1949 read in conjunction with s. 36(2) of the Banking Act 1973. He also argued that the joint trial of all cases would take a considerable length of time and that it is unlikely that the parties will get a continuous hearing at one stretch in the Sessions Court.

The other ground, which Mr. Gooi termed as a complementary ground, is that it is likely that there would arise some questions of law of unusual complexity during the course of the trial but he conceded he was not pursuing this ground vigorously.

I shall deal with this ground first. There are two charges for offences of criminal breach of trust under s. 409 of the Penal Code and charge for abetment of an offence of criminal breach of trust.

Our Penal Code is modelled on the Indian Penal Code. There is no dearth of cases on abetment or on criminal breach of trust either in its simple form under s. 405 or its aggravated forms under the other sections including s. 409; the considerable body of local, Singapore and Indian precedents on criminal breach of trust fill the law books of all lawyers practising criminal law in this country. These cases do indeed constitute the daily fare of most of our magistrates and Sessions Court Judges who deal in accordance with their statutory competence, either with the simple or aggravated forms of criminal breach of trust, from ss. 405 to 409 of the Penal Code.

Our Sessions Court Judges like their Singapore counterparts in the District Courts are either barristers or otherwise have other recognised legal qualifications. And under our present system generally our Sessions Court Judges do not have less than 7 years'

standing in the judicial and legal service. In Kuala Lumpur there are 4 Sessions Court Judges and their experience as officers of the judicial and legal service ranges from 11 years to 22 years.

Section 417(1)(b) of our law corresponds with s. 184(1)(b) of the Singapore Criminal Procedure Code. There have been several applications in Singapore under s. 184(1)(b) for transfer of cases from Subordinate Courts to the High Court. The reported decisions show that invariably these applications have been dismissed. Coomaraswamy J in *Lin Tah Hwa v. PP* [1987] CLJ (Rep) 1104 has discussed these and certain relevant Indian decisions (in respect of somewhat relevant Indian provisions) in a historical perspective. He noted that the provisions in India and in the Straits Settlement for transfer of case on **ground of some question of law of unusual difficulty** arising was to cater for the past ear where **judicial officers who were** supposed to hear certain difficulty arising was to cater for the past era where judicial officers who were supposed to hear certain difficult cases were either **not legally qualified or were inexperienced** to deal with them and could hardly have been expected to deal with intricate points of law. Coomaraswamy J said at p. 101.

> In the light of the decisions I have referred to, for provisions of s. 184(1)(b) to be successfully invoked today the case must be an extraordinary one and I find it extremely difficult to think of one. For the Historical reasons I have stated, and, given the qualifications of District Judge and the more senior magistrates, I am of the firm view that for all practical purposes and intents, para. (b) of s. 184(1) **has fallen into desuetude and obsolescene** for transfer of cases to the High Court.

At this hearing there was no attempt to show what the questions of law of unusual difficulty will be I personally cannot see any. Surely it cannot be argued that our Sessions Court Judges Will not be able to see what the constituent ingredients of criminal breach of trust under s. 409 or of abetment under s. 109 of the Penal Code are! To so argue is not the give credit to the legal qualifications the considerable experience and professional competence that these judicial officers possess. If indeed there should really be questions of law of unusual difficulty then the prosecution and defence are enjoined to do what they normally do in any case in any Court, to **clearly define and argue the issues** fully and exhaustively before the Court. But as I have said earlier I personally cannot see any question of law of unusual difficulty arising in the cases which are the subject matter of these applications. Rare indeed as Coomaraswamy J has observed in the case of *Lin Tah Hwa* can such an application based on the ground be invoked today. And like him I am wont to think "that for all practical purposes and intents", this particular provisions of law- in our case, para. (b) of s. 417(1) of our CPC - "has fallen into desuetude and obsolescene for transfer of cases to the High Court."

To my mind the applications under s. 417(1)(b) have no merit.

I now turn to the main ground of the applications. Mr. Gooi said that in the course of the trial of the respondents on the criminal breach of trust charges the prosecution would seek to admit bank statements in respect of the charges and the prosecution will rely on the evidence of 6 to 10 bankers. His argument was that in view of this, if the trial were to be proceeded with in the Sessions Court objections can be made by "account holders in a bank" as regards statements which the prosecution might seek to admit and "account holders have a legitimate right to object to the admission of such statements by virtue of s. 36 of the Banking Act 1973"; if account holders withhold their consent then the Sessions Court cannot compel officers of the Bank concerned "to produce those statements or accounts". The Sessions Court cannot so compel, Mr. Gooi argued, because s. 6 of the Bankers' Books (Evidence) Act 1949 only allow a High Court Judge to compel their production.

I shall now turn to s. 36(2) of the Banking Act. It does state that, *inter alia,* an officer of a bank shall not give divulge or reveal any information whatsoever regarding the moneys or relevant particulars of the account of customer unless:

(a) the customer or his personal representatives gives or give his or their permission so to do;

(b) the customer is declared bankrupt; or

(c) the information is required to assess the creditworthiness of the customer in connection with such credit bureau as may be established with the approval of the Central Bank or relating to a *bona fide* transaction or a prospective commercial transaction.

Absent any of pre-requisites (a), (b) or (c) above there can be no disclosure unless the central bank (Bank Negara) gives its consent. In the context of s. 36(2)(a) and the present application if an account holder refuses to give permission so to do, Bank Negara may authorise disclosure of information relating to moneys or relevant particulars of the account holder by an officer of the bank. If Bank Negara refuses to give its consent, then, in view of the proviso to s. 36(1) of the Banking Act, this refusal cannot limit the powers conferred on the High Court or a Judge thereof by the Bankers' Books (Evidence) Act 1949. Mr. Gooi has, however, intimated to the Court that the Public Prosecutor has copies of relevant entries needed for the trial - Bank Negara had Given requisite consent for such disclosure. It seems to me clear that, since relevant copies of the entries are already available and provided the requisite procedures spelt out in ss. 3, 4 and 5 of the Bankers' Books (Evidence) Act 1949 are complied with, these copies may be received at the trial of the cases which are the subject matter of these applications as *prima facie* evidence of the entries and of related matters, transactions nd accounts stated therein. I cannot see any necessity for the original books and their entries to be produced. But Mr. Gooi says since the prosecution is calling bankers as witnesses "we might as well produce the original documents". I find this argument difficult to follow as indeed also the other argument that the verification of signatures cannot be obtained against copies of signatures obtained under the Bankers' Books (Evidence) Act 1949. With photographic or photostating facilities so easily available now I cannot see how the facsimile of specimen signatures of customers kept in a bank or signatures appearing in other banking documents cannot be used for verification. In fact all these signatures and all other banking documents cannot be used for verification. In fact all these signatures and all other entries needed for Court use, provided they are entries in a bankers' book within the meaning of Act, can easily be made available page for page, blemish for blemish after due verification under the Act without resorting to the old fashioned method of copy typing entries with the inherent weakness of typographical errors creeping in. More so now than in 1879 or 1949 original books need not be produced in Court.

More about the Bankers' Books (Evidence) Act 1949. As far the Act is concerned it is modelled on the English Bankers' Books Evidence Act 1879. In fact the provisions of ss. 3, 4, 5, 6, 7 and 8 of the English Act are in *pari materia* with the corresponding ss. 3, 4, 5, 6, 7 and 8 of the Malaysian Act. It is important to note as was observed by Arulanandom J in *Goh Hooi Yai v. Lim Teong Ghee & Ors.* [1977] 2 MLJ 26 at p. 28 of the Malaysian Act, that

> (the) main object of the provisions of the Act is to enable evidence to be procured and given and to relieve **bankers from the necessity of attending and producing their books**" (emphasis mine)

The inconvenience of producing the originals in relieved by the Act.

It means that provided the book is one of the ordinary books of the bank, the entry was made in the usual and ordinary course of business, the book is in the custody or control of the bank and the copy been examined against original entry (all of which matters can be proved by the affidavit or the testimony of officer of the bank) (see ss. 4 and 5), a copy of an entry in a bankers' book shall, under s. 3, in all legal proceedings be received as *prima facie* evidence of such entry and of the matters, transactions and accounts therein stated.

Under s. 7(1) any party to a "legal proceeding" may apply for an order that he be at liberty to inspect or take copies of any entries in a banker's book for the purpose of the proceedings. The expression "legal proceeding" has been defined under s. 2 to mean any civil or criminal Proceeding or inquiry in which evidence is or may be given and includes an arbitration. For an application under s. 7 it is "the Court or a Judge" who makes the order requested for. The expression "Court" has been defined as meaning "the High Court and in connection with any proceedings before a Sessions Court ... includes such Court", unlike in England where the expression means "the Court, Judge, arbitrator, person or persons before whom a legal proceeding is held or taken". It would mean in view of the restricted meaning given to the expression "Court" under our Act that an application would have to be made to the Sessions Court if the application is in respect of a proceeding before the Sessions Court and in respect of other proceedings (before a High Court, a Magistrate's Court or an arbitration) the application would have to be made to a Judge of High Court.

In the English Act the expression "a Judge" means "with respect to England a Judge of the High Court ... and with respect to Scotland a lord ordinary of the Outer House of the Court of Session, and with respect to Ireland a Judge of the High Court ... in Ireland" and it is specifically provided that the Judge of a county Court may with respect to any action in such Court exercise the powers of a Judge under the Act. In our law the expression "Judge" as used in our Act is not defined. Bearing in mind the restrictive meaning given in our law to the expression "Court" as mentioned earlier the expression "a Judge" in our Act can only mean a Judge of the High Court.

Mr. Gooi is thus correct when he submitted that in respect of s. 6 of the Act only a High Court Judge may make an order in terms of s. 6.

Section 6 reads as follows:

> 6. An officer of a bank shall not, in any legal proceedings to which the bank is not a party, be compellable to produce any bankers's book the contents of which can be proved under this Act or to appear as witness to prove the matters, transactions and accounts therein recorded, unless by order of a Judge made for special Cause.

But to say that since only a High Court may make the order in terms of s. 6 and since the original records need to be produced in the trial, therefore the trial should be in the High Court is to argue that every time a case is prosecuted notwithstanding that it is triable in the Sessions Court or that it is triable in the Magistrate's Court so long as original banker's books are intended to be used the trial should be prosecuted before the High Court. This is to my mind is going too far. It is also argued that if the trial is held in the High Court the trial will proceed smoothly as the application for the production of the original documents can be made without interrupting the smooth running of the trial unlike the situation where the trial is held in the Sessions Court as the High Court Judge trying the case would be in a better position to appreciate the reasons for the application.

But that argument does not take into account that the application for such an order must necessarily involve the banker showing to the Judge why he should not be compelled to produce the original documents in a legal proceeding and in that event the trial will surely be interrupted for a hearing of the matter. If a banker has complied with the provisions of ss. 3, 4, and 5 he can only be compelled to produced the original documents or attend Court (see *Emmot v. The star Newspaper company* [1892] 62 LJQB 77) by order of High Court Judge made for special cause. The "special cause" is not something that is likely to arise at the trial suddenly. Well before the trial commences the prosecuting officer would know if he requires the originals and whether the banker would produce them and he would have marshalled his grounds to show "special cause" for an order under s. 6 to issue. Clearly therefore the application to a Judge of the High Court should normally be made well before a trial commences. And of course the application can well be made before any High Court Judge before the trial begins the Sessions Court as indeed it can be made to a High Court Judge while the trial in the Sessions Court is proceeding. I therefore cannot see any merit in the ground the Mr. Gooi advances in respect of s. 6 of the Act.

There is lastly the ground that it would not be possible to have one stretch of days for a continuous trial in the Sessions Court unlike in the High Court as the calendars of the Sessions Court are full. No High Court Judge would be unwilling to hear a non capital punishment case which is less distressing to hear than capital punishment cases usually without the benefit of jury or assessors, if it is a matter of subjective choice. But of course his choice can never be based on whims and fancies. The 3 High Court Judges in this building dealing with criminal cases for Selangor and the Federal Territory have to deal with 180 capital punishment cases as of today and it is not possible to lay aside several weeks at a stretch at the expense of these cases. All the prisoners are under remand and some of them have been under remand as far back as 1983. And they await trial for their lives. And while High Court trial go on virtually every day the number awaiting for trial does not appear to diminish as more prisoners join the queue month after month to await their turn in the docks. Surely priority should be given to those prisoners who await trial for their lives rather than to accused persons who are on bail and who otherwise lead a normal life outside. That is not to say that priority should not be given to the trial of cases of alleged criminal breach of trust of which there has been so much publicity but application should be made before the Sessions Court Judges who are bound to use their discretion wisely taking into account the usual matters like the seriousness of the offence, public, the number of witnesses and number of Counsel involved in the trial, whether dates can be adjusted, etc. I do think that where it comes to the Sessions Courts and the High Court it is perhaps easier to have an earlier and a continuous period of hearing before a Sessions Court than before High Court as there are more Sessions Court and it is easier to adjust their calendars.

My view is that having regard to all that has been said the applications should be dismissed and they are accordingly dismissed.

Also found at [1987] 2 CLJ 329